Supreme Court, U. S.
FILED
AUG 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-56

EDWARD L. CAREY, *Petitioner*

v.

C. W. DAVIS, PAUL R. DEAN AND HARRY HUGE, TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950 and UNITED MINE WORKERS OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROSS O'DONOGHUE
GEORGE A. FISHER
Union Trust Building
740 - 15th Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Decision Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	4
Reasons for Allowance of the Writ	8
I. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	8
A. A Trustee of a Taft-Hartley Trust May Not Be Discharged by One of the Settlors Because His "Loyalty" to That Settlor Is Questioned	8
1. There Was No Authority for Petitioner's Removal as Trustee by the District Court	8
2. The Court of Appeals Incorrectly Held That Petitioner's Removal as Trustee Was a Matter of Discretion	11
3. At No Time Has Petitioner Breached Any Duty Toward the Beneficiaries of the Fund or Had Any Conflict of Interest That Would Disqualify Him as Trustee	15
Conclusion	19
Appendix A	1a

CITATIONS

CASES: Page

American Nat. Red Cross v. Holtman, 122 U.S. App. D.C. 49, 351 F.2d 746 (1965) 14
Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971) 6, 10, 11, 14, 16
Blassie v. Kroger Co., 345 F.2d 58 (8th Cir. 1965) ... 10
Clerk's Investment Co. v. Sydnor, 19 App. D.C. 89 (1901) 14
Flynn v. Brooks, 70 App. D.C. 243, 105 F.2d 766 (1939) 14
Grabois v. Grosner, 124 U.S. App. D.C. 247, 363 F.2d 979 (1966) 14, 16, 19
Lewis v. Benedict Coal Co., 361 U.S. 459 (1960) 10
Lewis v. Seanor Coal Co., 256 F. Supp. 456 (W.D. Pa. 1966), *affirmed* 382 F.2d 437 (3rd Cir. 1967), *cert. denied,* 390 U.S. 947 (1968) 10
May v. May, 167 U.S. 310 (1897) 14
Miniard v. Lewis, 128 U.S. App. D.C. 299, 387 F.2d 864 (1967) 11, 13
Moir Hotel Co., In re:, 186 F.2d 377 (7th Cir. 1950) .. 16
Sheridan v. Perpetual Bldg. Ass'n., 112 U.S. App. D.C. 82, 299 F.2d 463 (1962) 16
Sternberg v. St. Louis Union Trust Co., 163 F.2d 714 (8th Cir.), *cert. denied,* 332 U.S. 843 (1947) 16
United Marine Division v. Essex Transp. Co., 216 F.2d 410 (3rd Cir. 1954) 11

STATUTES:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 6
29 U.S.C. § 186 .....2, 4, 8, 10
D.C. Code § 11-521 (1967 ed.) 6

OTHER AUTHORITIES:

54 Am. Jur. *Trusts* 19
House Report, No. 245, 80th Congress, 1st Session ... 11
7 Real Property, Probate and Trust Journal (1972)..8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

EDWARD L. CAREY, *Petitioner*

v.

C. W. DAVIS, PAUL R. DEAN AND HARRY HUGE, TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950 and UNITED MINE WORKERS OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Edward L. Carey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 6, 1974. That judgment was docketed in an appeal from an order of the United States District Court for the District of Columbia removing petitioner as one of the trustees of respondent United Mine Workers of America Welfare and Retirement Fund of 1950.

DECISION BELOW

The decision of the Court of Appeals was accompanied by an Opinion which is reproduced in Appendix A to this petition. The Opinion of the Court of Appeals has not yet been published in the official reports of that Court or in the Federal Reporter, Second Series.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1974, and affirmed a final judgment of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Congress, in enacting the Labor-Management Relations Act of 1947 which, among other things, authorized the creation of irrevocable union pension and welfare funds such as the United Mine Workers of America Welfare and Retirement Fund of 1950, intended that the rules for the regulation of such trusts should be different from ordinary trust principles and that the trustees of such trusts owe their principal duty to the settlor who appointed them rather than to the beneficiaries.

STATUTE INVOLVED

29 U.S.C. § 186(c)

> § 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.
>
> * * *

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other

places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . . .

* * *

STATEMENT OF THE CASE

Petitioner became a trustee of the United Mine Workers of America Welfare and Retirement Fund on June 15, 1971, by resolution of the International Executive Board of the United Mine Workers of America (hereinafter referred to as the "UMWA"). At the time petitioner was also serving the UMWA as its general counsel, a position he had held for approximately five years. Subsequently petitioner was specifically named as trustee in the 1971 collective bargaining agreement between the UMWA and the coal operators to serve as one of the trustees for the life of that agreement.

The historic background of the 1971 collective bargaining agreement, as it pertains to the Fund, was succinctly stated in the District Court's memorandum opinion, dated February 15, 1973, as follows:

> "Effective November 12, 1971, a new National Bituminous Coal Wage Agreement was made between the Union and the coal operator members, which agreement, by its terms, is to continue at least until November 12, 1974. Among other things, the agreement incorporates the provisions governing the operation and administration of the Fund. The Fund is an irrevocable trust created pursuant to Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c). The monies are vested in the Trustees and they

> are responsible for the on-going administration of the Trust. It is provided in Article XV that Carey shall be the representative of the Union on the Board of Trustees. The agreement further provides as a matter of contract that the Trustee shall serve "for the duration of this contract." It is further provided that the Union shall appoint a successor to Carey "in the event of resignation, death, inability or unwillingness to serve." Carey has not resigned and is willing to continue to serve." (JA 19)

Meanwhile, the incumbent president of the UMWA, W. A. Boyle, was the object of a great deal of civil litigation brought by dissident union members. One of these suits challenged Boyle's presidency and the plaintiffs therein were ultimately successful in requiring a new election, in which the pro-Boyle forces were defeated. (See Court of Appeals Opinion, page 4a, *infra*) As the Court below noted, the election was "hotly and bitterly contested." (Id., at 9a)

On December 22, 1972, Arnold Miller was certified as president of the UMWA. (JA 20) Within hours of his certification, he purported to discharge petitioner as general counsel without stating any cause. Shortly thereafter, on January 8, 1973, Miller sent a telegram to Carey which read:

> "EFFECTIVE THIS DAY, YOU ARE REMOVED AS THE RFPRESENTATIVE TRUSTEE OF UNITED MINE WORKERS OF AMERICA ON THE UMWA WELFARE AND RETIREMENT FUND.
>
> ARNOLD MILLER
> PRESIDENT, UMWA" (JA 18)

On January 9, at a meeting of the trustees, petitioner stated that the provisions of the Coal Wage

Agreement of 1971 barred his removal as trustee. A majority of the Board instructed counsel for the Fund to bring the matter to the attention of the Court for instructions. Pursuant to his instructions, counsel for the Fund filed a "Motion for Instructions . . ." with respect to the incumbency of Edward L. Carey as one of the trustees. (JA 11) The motion was filed in *Blankenship* v. *United Mine Workers of America Welfare and Retirement Fund,* a suit in which the District Court had entered certain remedial orders and by reason of which was overseeing the operation of the Fund *pendente lite.* Jurisdiction in Blankenship was predicated upon both 28 U.S.C. § 1332 and D.C. Code § 11-521 (1967 ed.).

After a hearing on January 22, an Order was entered on January 26, that authorized petitioner to continue as trustee pending further proceedings. (JA 17) At the hearing it was pointed out, *inter alia,* that the attempted removal of petitioner by the new UMWA president had not received the sanction of the International Executive Board of the Union and " . . . accordingly the Court ruled from the bench that Miller's letter had no force and effect and ordered that Carey should continue as trustee pending further order of the Court." (JA 18)

Thereafter the Union filed a further Me norandum stating, among other things, that the action of President Miller had received the approval of the board on January 29, 1973. (JA 20) Upon the submission of further memoranda on behalf of the parties, the Court in a Memorandum Opinion and Order dated February 15, 1973 stated:

> "There is nothing in the record before the Court, however, to indicate that Carey has failed the

> Union in a proper fiduciary capacity since his appointment. Nor is there any concrete factual showing made that Carey will not continue to be conscientious in the future. Significantly, the victorious Miller forces support and endorse the actions of the Trustees, including Carey, who have arranged and approved a far-reaching settlement of the complex pension and related benefit issues pending in this litigation." (JA 20)

The District Court then concluded " . . . as a matter of law that no grounds for removal of petitioner have been shown, that he is the lawful trustee under the agreement, and that he shall continue to serve." (JA 22)

On February 26, 1973, a "Motion for Reconsideration" was filed by the UMWA claiming that petitioner had "placed himself in a conflicting position with the UMWA" by having taken office space and sending out announcements stating that he was "Of Counsel" with the law firm of Forester and Perkins", which firm it was alleged was representing plaintiffs in a number of cases in which the UMWA was a defendant. (JA 23) Petitioner replied by Affidavit that he was in no way involved in any of those cases, but to avoid any suspicion of conflict, he had severed all connection with the firm. (JA 25-6)

A hearing was had on the motion for reconsideration at which time the Court said that in addition to these allegations it attached importance to the fact that petitioner had filed suit against the Union for breach of his employment contract as General Counsel for the Union. (JA 62) The Court "concluded in the exercise of its discretion that unless Mr. Carey resigns by close of business next Monday, an order for his re-

moval will be entered." Petitioner did not resign. An order was entered on March 19 ordering "that Edward L. Carey be and hereby is removed this day as Trustee of said Fund". (JA 27)

REASONS FOR ALLOWANCE OF THE WRIT

I

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. A TRUSTEE OF A TAFT-HARTLEY TRUST MAY NOT BE DISCHARGED BY ONE OF THE SETTLORS BECAUSE HIS "LOYALTY" TO THAT SETTLOR IS QUESTIONED

1. There was No Authority for Petitioner's Removal as Trustee by the District Court

In recent years many pension and welfare trusts of the type authorized by Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c), have come into existence. One such trust is the United Mine Workers of America Welfare and Retirement Fund of 1950. Because of the unique nature of these trusts, questions have arisen as to the proper role of the trustees thereof since they are generally created by virtue of collective bargaining agreements. The statute spells out the procedure for the appointment of the trustees. Although there is language in the Act to the effect that the appointees of the settlors are representatives thereof, the statute does not define that term and there is nothing in that legislation to suggest that any principle relating to the duties of trustees other than the general principles of trust law should apply. See Welch, *Applicability of Trust Law Principles to Taft-Hartley Trusts,* 7 Real Property, Probate and Trust Journal 522 (1972).

In the instant case, the UMWA has made no assertion, either in the District Court or in the Court of Appeals, that petitioner failed in any way to carry out his fiduciary responsibility as trustee during the twenty months that he has served in that position. Indeed, the Court of Appeals specifically stated that "at no time during the stewardship of [petitioner] as Trustee is there the slightest indicia or evidence of any improper action on his part as a manager of the Fund." (Opinion, p. 11a, *infra*) The United Mine Workers of America claim that petitioner is unacceptable to it as a trustee; and for that reason he should be removed. Apparently, "loyalty" to the UMWA in its view is to be the qualification for service as a trustee without regard to the quality of his service as a fiduciary.

The thrust of respondent union's argument is that the pension and welfare fund is a "hybrid trust" and that the trustees named in the collective bargaining agreement are really agents of the settlors designated to administer the fund. This self-serving formulation of criteria, if accepted by the Court, would make the trustee named by the Union (but not the trustee named by the Coal Operators) an extension of the UMWA for the transmission of information to and from the Board of Trustees. The union considers itself "an essential conduit through which the views and criticisms of the beneficiaries regarding trust policies may be brought to the attention of the trust and through which trust policies may be conveyed to the beneficiaries." (UMWA brief in Court of Appeals, p. 16). According to the UMWA, "(It) is entitled to the same loyalty from the trustee as the beneficiaries." (Id., p. 17).

Respondent union cites no authority for the proposition which it sets forth. If this Court sanctions the

UMWA's argument, it will, in effect, be allowing a lower federal court to decide an important question of federal law which this court has never considered. It is clear that the fund is to be used only for the sole and exclusive benefit of employees, their families and dependents. The fund is in no way an asset or property of the union. *Cf. Lewis* v. *Benedict Coal Co.,* 361 U.S. 459 (1960); *Blassie* v. *Kroger Co.,* 345 F.2d 58 (8th Cir. 1965).

To be sure, a review of Section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c), does refer to "representatives" of the employer and the employees in connection with the administration of the fund; but too much stress should not be placed on the term "representative," since the primary purpose of Section 302(c) of the Act was "not to alter, but reinforce", the trustees' duty of "undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle,* 329 F. Supp. 1089, 1095 (D.D.C. 1971); see also *Lewis* v. *Seanor Coal Co.,* 256 F. Supp. 456 (W.D. Pa. 1966), affirmed 382 F.2d 437 (3rd Cir. 1967), cert. denied, 390 U.S. 947 (1968).

There is no inherent contradiction between the joint administration of a pension and welfare trust by union and management and the requirement that the trustees of such a trust adhere to a standard of nonpartisan fiduciary responsibility. The joint administration assures both union and management that the trust proceeds are being properly managed and disbursed. The concept of nonpartisan fiduciary responsibility assures the independence of the trustees and makes possible their undivided loyalty to the trust beneficiaries.

The principle that the pension and welfare trustees are not agents or extensions of the settlors who appointed them but rather independent fiduciaries is, of

course, quite consistent with the purposes of the Taft-Hartley Act which sought to prevent interference with employee rights [1] and with the District Court's opinion in the portion of the present case [2] which came up on appeal before the present offshoot thereof was even filed. The principle was accepted in *Miniard* v. *Lewis,* 128 U.S. App. D.C. 299, 387 F.2d 864 (1967), when at Footnote 5, the Court stated: "Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union." See also, *United Marine Division* v. *Essex Transportation Co.,* 216 F.2d 410, 412 (3rd Cir. 1954); Welch, *Applicability of Trust Law Principles to Taft-Hartley Trusts,* 7 Real Property, Probate and Trust Journal 522 (1972).

2. The Court of Appeals Incorrectly Held that Petitioner's Removal as Trustee was a Matter of Discretion

The crux of the Court of Appeals' ruling is set forth in the three paragraphs of its opinion which are quoted as follows:

> The statutory scheme for the Fund provides that ". . . employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon . . ." It is evident that Congress was aware of the unusual need in the field of labor relations for the special interests of the employers and the employees to be *represented* in the administration of the trust. Also, recognizing that such representation might frequently lead to

---

[1] H. Rep. No. 245, 80th Congress, 1st Sess. 29-30.

[2] *Blankenship* v. *Boyle, supra.*

> irreconcilable conflict, a neutral party had to be added to the board.
>
> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. However, the District Court on March 15, 1973, made the unchallenged finding that "[c]lose collaboration with the Union is required in an atmosphere of mutual confidence to further the objectives and the effectiveness of the Fund." This places an even more stringent requirement on the actions of a Union Trustee, a requirement which is here of crucial importance.
>
> * * *
>
> In view of the foregoing, we hold that the District Court did not abuse its discretion in removing [petitioner]. (pp. 7a-8a, 11a, *infra*)

The quoted portions of the appellate court opinion make it clear that this case was not decided on the basis of the District Court's authority to remove petitioner, which would necessarily have a predicate in the statute or in the general rules of trust law, but rather on the issue of whether the trial court abused its discretion in ordering his removal. The reference by the Court of Appeals in the second quoted paragraph to a so-called "unchallenged finding" that a close relation was necessary between the Union and the trustee representing the employees is nothing more than a red herring which distracted the Court and caused it to lose sight of the trust principles which should be controlling here. There is nothing in the Taft-Hartley Act which establishes "close collaboration with the Union" as a criterion for service and, it is submitted, the Court of Appeals acknowledged this when it noted in the first quoted paragraph that the statutory scheme called for "the employers and the employees", not the

Union, "to be represented in the administration of this trust." Parenthetically, it should be noted that the Court in making this declaration presumably had in mind the representation of a management and a labor point of view on the board of trustees rather than a strict agency representation. Compare *Miniard* v. *Lewis, supra,* 128 U.S. App. D.C. at 300, 387 F.2d 864, 865, fr. 5. Moreover, the "finding", in fact was challenged by petitioner in the Court of Appeals when he argued at page 15 of his principal brief that "[T]here is no evidence that close collaboration" between the Union and the trustee it appointed "is requisite."

The lower court decisions in this case are all the more remarkable when it is noted that they represent a complete departure from the initial opinion of the District Court which, in part, stated as follows:

> "This Court has had occasion in the past to emphasize that the Union does not control the Fund merely because the Union represents most beneficiaries. The Court, in fact, replaced Boyle, the head of the Union, as Trustee because he sought to override fiduciary obligations by assertions of political Union power."
>
> * * * * *
>
> "The very nature of the Fund, however, is such that its integrity will be undermined if the Union is given the unilateral right to remove the Union Trustee whenever dissatisfaction or differences prompted by personality or political factors prompt the Union's management to seek a change." (JA 21) (Footnote omitted)

The entire history of this particular Fund demonstrates the danger inherent in a too close association between the Union and the trustee. The history is set

out in detail in Judge Gesell's opinion in *Blankenship* v. *Boyle,* 329 F. Supp. 1089 (D.D.C. 1971).

There are cases which hold that friction between the trustee and the beneficiaries, or among the trustees themselves, is an important consideration in determining whether or not a particular trustee should be removed and the rationale is apparent. See, *e.g., May* v. *May,* 167 U.S. 310 (1897). But even these cases generally hold that "To warrant the exercise of discretion to remove, there should be neglect of duty or misconduct; mere ill-feeling between the settlor and trustee is not sufficient." *Flynn* v. *Brooks,* 70 App. D.C. 243, 245, 105 F.2d 766, 768 (1939). See also *Grabois* v. *Grosner,* 124 U.S. App. D.C. 247, 363 F.2d 979 (1966); *American National Red Cross* v. *Holtman,* 122 U.S. App. D.C. 49, 351 F.2d 746 (1965); and *Clerks' Investment Co.* v. *Sydnor,* 19 App. D.C. 89, 98 (1901). Trusts are established for the good of beneficiaries and if the beneficiaries suffer as a result of hostility or antagonism, a Court is justified in taking appropriate action. The opposite is true with regard to the settlor. He may not determine or dictate the interests of the beneficiaries but the fiduciary is charged with this responsibility. The settlor may not change the trustee unless that power is specifically reserved in the trust instrument, nor may he ask for the removal of the trustee because of hostility between them. Research has failed to reveal a single previous case where hostility between the settlor and the trustee has been a basis for the trustee's removal. Nor does the Court of Appeals cite any such precedent in its opinion.

3. At No Time Has Petitioner Breached Any Duty Toward the Beneficiaries of the Fund or Had Any Conflict of Interest that Would Disqualify Him as Trustee

The Court of Appeals specifically noted at the end of its opinion that "[Petitioner's] actions relating to the management of the Fund have at all times comported with the degree of care required of a Trustee." (Appendix, p. 11a, *infra*) Thus the Court seems to be saying that while petitioner has heretofore acted as a good trustee, he may nonetheless be removed in the suspicion that he may have a conflict of interest with the Union which could spill over and affect his relationship with the beneficiaries of the Fund.

This suspicion of the District Court reflected in its order of removal contrasts markedly with the initial ruling of the trial court which rejected just such a basis for removing petitioner. As the Court of Appeals declared in its Opinion:

> When the Court considered the matter of [petitioner's] removal on February 15, 1973, the evidence presented was directed primarily to the Union's feelings that because Carey was closely allied with the defeated Boyle faction, that he would not "seek to implement the wishes and programs of the membership." The Court declined to remove [petitioner] at that time, finding that there had been no concrete, factual showing that Carey had failed to fulfill his fiduciary obligations. However the Court warned Carey that "[h]is conduct must in all respects be responsible, impartial, and devoid of political motivation."
>
> (p. 9a, *infra*)

Clearly, there never has been any "concrete, factual showing that Carey had failed to fulfill his fiduciary obligations."

Therefore, the basis for the order of removal has to be the suspicion that petitioner might let his personal grievances with the UMWA affect the performance of his duty as trustee. No conflict of interest between petitioner and the beneficiaries of the Fund has ever been alleged.

The rule in the District of Columbia and elsewhere is that a Trustee ordinarily will not be removed in the absence of a showing of maladministration. *Grabois* v. *Grosner,* 124 U.S. App. D.C. 247, 363 F.2d 979 (1966); *In re: Moir Hotel Co.,* 186 F.2d 377 (7th Cir. 1950); *Sternberg* v. *St. Louis Union Trust Co.,* 163 F.2d 714 (8th Cir.), *cert. denied* 332 U.S. 843 (1947). To be sure, a conflict of interest with the beneficiary of a trust may shift the burden to the trustee to demonstrate that he has been faithful to his trust, Cf., *Sheridan* v. *Perpetual Bldg. Ass'n.,* 112 U.S. App. D.C. 82, 299 F.2d 463 (1962); *Blankenship* v. *Boyle, supra,* but neither respondent union nor the Court of Appeals cite any authority for the claim that a purported conflict of interest with a settlor is grounds for the disqualification of a trustee.

The claim of conflict of interest made by respondent union is predicated upon an alleged association between petitioner and the law firm of Forrester & Perkins, described by the UMWA in its brief in the Court of Appeals as its "chief antagonist" because it represented various union members and others with close connections to the union in litigation with the UMWA. There was no claim and no proof that petitioner participated or in any way profited in these cases. Indeed, the only evidence is directly to the contrary, (J.A. 25, 47, 55-56) and when it appeared to petitioner that his office-sharing arrangement with the

firm might be misunderstood, he terminated the relationship after only about 10 days (JA 41).

Petitioner's suit against respondent union for reinstatement, back wages, and punitive damages as a result of his discharge as general counsel was also cited by the District Court as a factor in its removal of petitioner as trustee. In this respect, the Court of Appeals remarked that "while neither this Court nor the Trial Court would contend that any Trustee of the Fund should be precluded from pursuing his legal rights, we feel that the present situation at best makes Carey a nominal antagonist to the current Union administration and at worst may embroil him in an extensive and particularly bitter adversary hearing." (Opinion, p. 10a, *infra*)

Noteworthy is the fact that the UMWA did not state as a basis for its motion for reconsideration or removal that petitioner had filed a suit against the Union charging breach of an employment contract. The Court, however, attached significance to this and said:

> "... of course, the litigation here will embroil Mr. Carey—who has much confidential information concerning Union affairs—in what may well be an extensive adversary discovery proceeding pretrial, going to the good faith and the background facts affecting his discharge." (JA 62)

Again, there is no evidence that the litigation would embroil petitioner or that he has confidential information concerning union affairs which have any bearing on this case. The Court said "obviously a trustee should not be precluded from pursuing his legal rights". But, of course, that is exactly what the Court would prevent by its decision. If the trustee believes he has a claim against the union he should not be re-

quired to forego his right of access to the courts in order to avoid the fear of being discharged from his position as trustee. This permits the Union to do by indirection, what it may not do directly, that is, to discharge the trustee. It can and did here bring about the necessity for petitioner's law suit by discharging Mr. Carey and refusing to discuss with his counsel any amicable settlement thereof. A settlor may not provoke a law suit and claim that as evidence of hostility in seeking the trustee's discharge.

The District Court said that petitioner had demonstrated in his testimony before the Court extreme antagonism toward the present management of the Union. Mr. Carey's testimony (J.A. 28-56) fails to reveal this alleged intense antagonism. It is true that he complained about some mistreatment, but as far as his testimony concerning his function as trustee is concerned, it demonstrates that he was acting responsibly. For example, petitioner reported in detail to President Miller regarding the agreements worked out with Internal Revenue for the benefit of the pension trust. (J.A. 47-50) If petitioner expressed any anger it was for reasons engendered by the Union. The settlor obviously may not foment disharmony by provocations such as curt telegrams of dismissal, searching personal files and failing to respond to requests for meetings by the trustee, and then complain that these provocations resulted in a feeling of hostility and that such hostility should be the basis for the dismissal of petitioner as trustee.

It is pure speculation to conclude that disharmony between petitioner and respondent union will affect the functioning of the Trust. It is the law that the grounds for removal of a trustee must rise above such sheer

speculation. 54 Am. Jur., *Trusts* § 132 (1945 ed.); *cf. Grabois* v. *Grosner*, 124 U.S. App. D.C. 247, 363 F.2d 979 (1966). To permit the removal of a fiduciary upon mere suspicion or belief that the fiduciary's mental attitude toward a settlor might somehow adversely affect his duty to work with the other trustees for the benefit of a large class of beneficiaries would seriously impede the exercise of an independent judgment by such trustee.

CONCLUSION

By holding that the District Court in its discretion could remove a trustee of a Taft-Hartley trust solely because of certain conflicts between that trustee and one of the settlors of that trust, the United States Court of Appeals for the District of Columbia Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The action of the lower courts in effect separates the Taft-Hartley trust from the applicability of general trust law principles and, if unchecked, makes the trustee appointed by the union settlor a mere agent of that union in derogation of his fiduciary duty to the beneficiaries of the Fund.

Respectfully submitted,

ROSS O'DONOGHUE
GEORGE A. FISHER
Union Trust Building
740 - 15th Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner